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was not a party and upon which he himself paid no premiums should not furnish a source of unjust enrichment to his estate. In such a case the company should be relieved from any liability further than a repayment of premiums. For if the beneficiary who at law has the only right in the *chose* in action is barred by his crime from reaping its benefits, any disposition of money, just as of lands and chattels willed or inherited, must be made on equitable principles and only to such persons as have been unjustly impoverished.³²

THE CODE OF MARITIME NEUTRALITY. — A newly completed code of rules of maritime neutrality was submitted recently to the American Institute of International Law, and by it referred to the national societies of international law in the twenty-one American republics.¹ The thirty-four articles of the Code consistently display an attitude and present a method of approach new, in this intensity, to international law. The high tide of belligerent aggression in the present war has brought about what is perhaps the sharpest and most violent neutral reaction in the history of international law.

Article 1, defining neutrality, sounds the keynote of the Code by formulating and stating in keenly insistent language what is certainly generally admitted to be the true relation of neutral governments to belligerents.² Article 2, a general declaration though it is, contains the first sharp variance from established principles, in the imposition on neutral governments of a duty to "refrain from increasing the number of belligerents," and indeed more, "a duty of pacification toward mankind."³

The chapter entitled Freedom of Commerce in Time of War contains two of the most considerable differences from existing international

³² As regards the effect of homicide upon dower rights and the rights of tenants by the entireties see, in addition to cases in note 19, *supra*, *Box v. Lanier*, *supra*; *Beddingfield v. Estill*, 118 Tenn. 39, 50, 100 S. W. 108, 111; and *Lucas v. Harris*, an unreported Tennessee case outlined in 118 Tenn. 39, 50.

¹ In THE CHRISTIAN SCIENCE MONITOR for January 25, 1917, the Code was published in full, with the following introduction, telegraphed from Washington: "A code of rules of maritime neutrality which should govern the relations between belligerents and neutrals, prepared on the recommendation of Secretary Lansing, is to be submitted to the American Institute of International Law today in session at Havana, Cuba. The code was drafted by Dr. Alejandro Alvarez, secretary-general of the institute, and who formerly was jurisconsult of the Chilean Foreign Office and counselor to Chilean legations abroad. The code will be referred to the National Society of International Law in each of the 21 American republics, and final action on the code will be taken by the institute at its next annual meeting."

It is understood that Dr. James Brown Scott, who presided at the meeting of the Institute, has at present in course of preparation an analysis of the Code.

² The term "belligerent" is used throughout this note to indicate a belligerent power.

³ See 2 WESTLAKE, INTERNATIONAL LAW, 2 ed., 190 *et seq.* The first paragraph of Westlake corresponds largely to the definition of neutrality in Article 1 of the Code; but the succeeding paragraph is radically different in spirit and in substance from Article 2. Thus: "We may sum up by saying that neutrality is not morally justifiable unless intervention in the war is unlikely to promote justice, or would only do so at a ruinous cost to the neutral."

Cf. 4 CALVO, LE DROIT INTERNATIONAL THÉORIQUE ET PRATIQUE, 5 ed., §§ 2491 *et seq.*

law. Article 7⁴ expressly and completely prohibits any form of commercial blockade. Thus is destroyed in its entirety that recently developed and extremely efficient weapon which international law has given to belligerents.⁵ This article at least seems to be the result of belligerent application of the principles of blockade in the present war.⁶ Article 8⁷ provides that neither belligerent nor neutral merchant vessels can be confiscated or sunk,⁸ and apparently also exempts from confiscation enemy property on the high seas that is not contraband.⁹ The immunity of ships is, of course, a fundamental change from existing law. An explanation of it is to be found not only in resentment at events of the present war, but perhaps also in a realization of the tremendous importance to all the world of any change in the mercantile marine status of any nation.¹⁰ It may indeed be the forerunner of an internationalization of ships. Article 9 of the Code abolishes the right of search, substituting for it a certificate of "no contraband" to be given by the authorities at the port of departure. If a belligerent refuses to take that as conclusive, it may search for contraband: if contraband is found, a fine is to be imposed upon the neutral authorities issuing the false "passport"; if it is not, the belligerent is to be fined.¹¹ The practicability of this proposed method may perhaps be doubted, but it is to be commended as an attempt to harmonize the present illogical and inconsistent rules of international law on this subject, as well as to adapt them to modern mercantile conditions. Article 10 is an unimportant prohibition, placed on belligerent merchant vessels, to refuse to carry from one neutral port to another enemy nationals (except those who presumably are going to enlist in the enemy forces) or enemy goods. There would appear to be sufficient neutral interest in such transportation to warrant this prohibition. Article 11¹² concisely forbids the seizure (and apparently the examination is included also) of neutral or belligerent "postal correspondence," whether public or private, on the high seas; the required immunity even extends to correspondence on merchant vessels of the

⁴ "Article 7 — The commercial blockade, both of the belligerent ports and the maritime zone along belligerent coasts, is formally forbidden, no matter what the means by which the blockade is to be effected."

⁵ See HALL, *INTERNATIONAL LAW*, 6 ed., 695 *et seq.*; 2 WESTLAKE, *supra*, c. IX., "Declaration of London and Blockade."

⁶ The belligerent aggression against neutral rights referred to here and elsewhere in this note is to be found clearly set forth in the United States' "white books," published as DEPARTMENT OF STATE, *DIPLOMATIC CORRESPONDENCE WITH BELLIGERENT GOVERNMENTS RELATING TO NEUTRAL RIGHTS AND DUTIES, EUROPEAN WAR, NOS. 1, 2, and 3.*

⁷ "Article 8 — Private property in the open sea is inviolable. Belligerent and neutral merchant vessels may in no case be confiscated, nor sunk, under any pretext whatsoever. If carrying contraband, this may be confiscated or destroyed by the captor."

⁸ From the context this prohibition would appear to be restricted to the open sea, but that is not in terms stated.

⁹ *Cf.* 2 WESTLAKE, 147; HIGGINS, *THE HAGUE PEACE CONFERENCES*, 78 *et seq.*; Harold Scott Quigley, "The Immunity of Private Property from Capture at Sea," 11 *AM. J. INT. LAW* 22.

¹⁰ *Cf.* 30 *HARV. L. REV.* 497.

¹¹ These fines are to be imposed by the conference of neutrals, discussed later.

¹² "Article 11 — The official or private postal correspondence of neutrals or belligerents found in the open sea on board a neutral or enemy vessel, is inviolable. It may not be seized, even under the pretext of the police right of warships over merchant ships of their own nationality."

searching belligerent. This, excluding from its prohibition, as it apparently does, mailed merchandise, would seem to be not only a rule highly desirable in view of recent belligerent action and the development of a much higher intensity of international commercial competition, but also one that is not textually far from the present Article 1 of the Hague (11) of 1907.¹³

Chapter IV, Rights and Duties of Belligerents, makes practically no changes of importance. Article 12 requires belligerents "to respect the sovereign rights of neutral powers." Article 13, forbidding belligerents to make of "neutral ports and waters the base for naval operations . . . and to install therein wireless apparatus . . .," is taken virtually verbatim from the Hague (13) of 1907.¹⁴ Articles 14 and 15 allow belligerent men-of-war, auxiliaries, and aiding merchant vessels, whether neutral or belligerent, access to neutral ports only in "the duly justified case of force majeure";¹⁵ and Article 15 contains also the repair provisions of Article 17 of the Hague (13).¹⁶ The conditions on which a belligerent merchant vessel may ship fuel and provisions in a neutral port are, by the important Article 16, left wholly to local regulation, or, in the absence of this, the conditions are the same as in time of peace.¹⁷ Article 17 provides that if a merchant vessel has passed to a belligerent man-of-war fuel or provisions obtained by it in a neutral port, "no fuel or provisions shall thereafter be furnished in such country to any ship of the company" owning the guilty vessel. Thus the owners are effectively penalized, and at the same time the skirts of the neutral government are kept clear. Article 18 covers the case of a merchant vessel suspected of such conduct, and provides that other neutrals shall be notified, and that the ship may be refused fuel and supplies by the neutral power, or her agent requested "to furnish bail guaranteeing that said vessel will neither help nor assist the belligerent." Article 19 imposes very severe conditions on the admittance as merchant vessels of retransformed belligerent auxiliaries.¹⁸ Belligerent aeroplanes, dirigibles or airships are forbidden, by Article 20, to fly over neutral territory or jurisdictional waters; and if they break this rule they are to be confiscated, "if possible," and the belligerent government in any case is to pay an indemnity.¹⁹

¹³ See HIGGINS, *supra*, 396, 401. Cf. 16 COL. L. REV. 665.

¹⁴ HIGGINS, 447. Cf. also the Hague (5) of 1907, especially Article 3 (a). HIGGINS, 281 *et seq.*, 291.

¹⁵ Stress of weather is apparently the only "force majeure" recognized, since the article says: "The need of revictualling, of fuel or provisions, does not constitute a force majeure." Would the approach of an enemy man-of-war constitute such a "force majeure"?

¹⁶ HIGGINS, 450, 473.

¹⁷ This article has considerable possibilities.

¹⁸ The conditions are five: (1) that the retransformed vessel has not violated the neutrality of the admitting country; (2) that the retransformation has taken place in the ports or waters of the ship's country or its allies; (3) that the retransformation has effectively deprived the ship of power to serve as an auxiliary in the future; (4) that all interested neutrals have been informed by the belligerent government of all such retransformations; and (5) "that the said government agree that in the future the said vessels shall not again as auxiliaries be destined to the service of the armed fleet."

The fifth clause alone would as a matter of fact be enough to exclude the retransformed ship in almost every case, as the present war has shown repeatedly.

See HIGGINS, 319.

¹⁹ This is more or less in accord with international law as the present war has de-

Chapter V pertains to rights and duties of neutral powers; it differs from existing international law in no important particulars. Article 21 draws the line sharply between acts of aid to a belligerent by a neutral government and such acts by a neutral individual — an elementary distinction that is too often overlooked. Article 22 requires a neutral power, on the commencement of a war, to give belligerent men-of-war in its ports notice to leave within twenty-four hours, or “within the time prescribed by local law.”²⁰ Article 23 places a duty on neutral powers to use “all available means” to prevent the equipping or arming in its waters of vessels for a belligerent armed force.²¹ Article 24 states that neutral governments (though they themselves may not sell munitions to a belligerent by Article 20) are not bound to prevent the sale or exportation of munitions to a belligerent by individual neutrals. This, of course, accords with the present rule of the law of nations.²² Article 25 imposes a duty on neutral powers to prevent recruiting by a belligerent in their territory;²³ but belligerent nationals are to be allowed, as at present, to leave neutral territory voluntarily for military service, “even when organized on a large scale.” A neutral government is, however, allowed to prohibit the voluntary leaving of belligerent nationals who are also its own nationals, unless they declare that by enrolling they intend to lose their neutral citizenship. Neutral powers are to be allowed to regulate the use of their telegraphs and cables, provides the rather unnecessary Article 26. Article 27 states that neutral powers have a duty to prevent breaches of neutrality within their territorial waters. By Article 28 a belligerent man-of-war or merchant vessel which enters neutral waters in violation of “these rules” may be at once interned by the neutral power. The neutral controls the internment, and the cost is borne by the belligerent, Article 29 provides. The possibly ambiguous Article 30 says that in the case of such internment of a merchant vessel “the part of the merchandise destined for the neutral country must be unloaded and the part destined for other ports must be transhipped.”²⁴ Article 31²⁵ is unique and interesting. It provides that neutral powers may send hospital ships to the scenes of nearby naval actions, “which shall, to the end of their mission, enjoy absolute inviolability.” And “the said wounded or wrecked shall not be interned, but given their freedom as soon as possible.”²⁶

Article 33 is an unimportant enumeration of the duties of local authorities of neutral countries.

veloped it. See PHILLIPSON, *INTERNATIONAL LAW AND THE GREAT WAR* (English, 1915), 314 *et seq.*

²⁰ An identical rule is laid down by Article 13 of the Hague (13) of 1907. HIGGINS, 449, 469, 470.

²¹ Cf. HALL, *supra*, 611 *et seq.*; HIGGINS, 448, 465.

²² 7 MOORE, *DIGEST OF INTERNATIONAL LAW*, 748, 749. For the similar rule of the Hague (13) of 1907, see HIGGINS, 447, 448, 464.

²³ See HALL, 592.

²⁴ These provisions concerning internment are in accord with present international practice, with perhaps the exception of the unimportant Article 30.

²⁵ Perhaps inspired by the exploits of the U-53 off Nantucket Lightship?

²⁶ This seems to indicate a changing conception of neutral relationship to belligerency, which belligerents, in this respect at least, can hardly object to. The provision for freedom of the survivors is probably warranted because of the immunity given the neutral hospital ships.

Chapter II, entitled Conference of Neutrals, contains what will ultimately prove to be the most important provisions of the Code. It establishes, in brief, a council of the neutral states of the entire world, to be connected with the Administrative Council of the Permanent Hague Court, and to meet in The Hague Peace Palace upon the outbreak of war. This conference of neutrals shall "take all necessary measures to maintain the freedom of commerce and of navigation of the neutral countries," shall "determine the list of articles to be regarded as contraband," shall see to the observance of the neutral rights and duties created by the Code, and shall exercise any other powers given it by the Code. Belligerents shall be invited to send representatives, who shall have full voting rights. "Resolutions shall be adopted by a majority vote, and bind the minority." The conference is empowered to authorize the following severe measures against a belligerent or a neutral who refuses to respect the rights and duties of neutrality: "public blame, pecuniary indemnity, commercial boycott, and even the use of an international force to be determined by the conference."²⁷

There is thus to be established a league to protect neutrals which corresponds strikingly to the most advisably urged form of what has been called a league to enforce peace.²⁸ Every possible method of enforcement of international law is provided by Article 5. This chapter is fraught with a significance almost inestimable: the mere fact of its formulation, unofficial though it may be, is one of the great events in the history of international law and in the development of international relations.²⁹

²⁷ The text of the articles concerning the conference of neutrals is as follows:

"Article 3 — When war is declared the neutral states of the entire world shall, upon the request of the Administrative Council of the Permanent Hague Court, meet in conference, in order (1) To take all necessary measures to maintain the freedom of commerce and navigation of the neutral countries; (2) To determine the list of articles to be regarded as contraband; (3) To see especially to the observance of all neutral rights and duties established in these present rules, and to exercise any other powers granted them by the said same rules.

"Article 4 — The conference of neutrals shall gather in The Hague Peace Palace, unless the council directs otherwise. The belligerents shall be invited to send representatives who may take active part in the discussion and have the right to vote. Resolutions shall be adopted by a majority vote and bind the minority.

"Article 5 — In important cases the conference may authorize severe measures against the belligerent or against the neutrals refusing to respect the rights and duties of neutrality. Such measures may be: public blame, pecuniary indemnity, commercial boycott, and even the use of an international force to be determined by the conference.

"Article 6 — The conference of neutrals may organize in any number of commissions thought necessary, one of these commissions specially designated to consider such pecuniary indemnities as are considered in these rules."

The conference is referred to also in Articles 9, 18, 19, 20, 32, and 34. Article 34 also says it "might appoint commissions composed of neutrals whose duty it would be to watch, in each belligerent country, over the manner in which the laws and customs of war are there observed. Upon the basis of the information and reports of these commissions the said conference, in the name of all the neutral countries, may, if deemed appropriate, protest against the violation of the laws and usages of war."

²⁸ Cf. H. N. Brailsford, "Peace by Organization," 11 NEW REPUBLIC 187 (March 17, 1917), at p. 189 especially.

²⁹ Cf. Sir Frederick Pollock, "Cosmopolitan Custom and International Law," 29 HARV. L. REV. 565, 577 *et seq.*

The Code as it stands needs much revision, and even when it is adequately modified it will not secure the immediate support of the great maritime powers, which alone could make it effective. But its mere formulation indicates the desires and the ideals of the neutrals furthest from the seat of the present war; the last century has seen the gradual incorporation of neutral ideals into international law; and the three great principles the Code embodies — the abolition of blockade, the immunity of ships, and the force-equipped conference of neutrals — may eventually become part of the law of nations.

THE LABOR PROVISIONS OF THE CLAYTON ACT. — The labor sections of the Clayton Anti-Trust Act¹ were intended, according to the Judiciary Committees of the Senate and House, respectively, "to exempt labor . . . organizations from the operation of the anti-trust acts," and "to constitute for labor a complete bill of rights in equitable proceedings in the United States Courts."² Organized labor is naturally relying upon the Act as a charter of immunities.³ Some current criticism, however, holds the Act entirely futile, a mere declaration that what is lawful is lawful.⁴ An intermediate view seems justifiable, — that the Act accomplishes some things, particularly by way of removing uncertainties in the law.⁵

The Act attacks the problem of the labor dispute in the law from two angles, from the side of the substantive federal law of restraint of trade, and from the side of the remedy in the federal courts for threatened injury. The one side concerns the prohibitions of the Sherman Anti-Trust Act, the other, the issuance of injunctions by federal courts in labor disputes.

There can be no intelligent discussion of the effect of the Clayton Act on the Sherman Act as applied to labor unions without careful consideration of the position of the labor union at common law and under the Sherman Act. At the outset it is necessary to appreciate that a combination of sellers of labor to raise the price of their commodity and otherwise to regulate the terms of its exchange must of necessity impose some restraint on the freedom of the buyer of labor to trade in the labor market. This restraint, however, the common law had come to regard as inevitable, and justified by the necessities of collective bargaining. Therefore, by the weight of authority, such a combination, without more, was not considered to be a combination in restraint of trade,⁶ nor did it become

¹ 38 STAT. AT L. 730.

² Sixty-third Congress, 2d Sess., SENATE REPORT, No. 698, pp. 2, 12.

³ See Mr. Samuel Gompers, in the AMERICAN FEDERATIONIST, Oct., 1914.

⁴ See THE NEW REPUBLIC, Dec. 2, 1916.

⁵ See SENATE REPORT, *supra*, 25. "The necessity for legislation . . . arises out of the divergent views which the courts have expressed on the subject and the difference between courts in the application of recognized rules." And see p. 33, "The bill does not interfere with the Sherman Anti-Trust Act at all."

⁶ *Master Stevedores' Ass'n v. Walsh*, 2 Daly (N. Y.) 1. See 28 HARV. L. REV. 696. Cf. *More v. Bennett*, 140 Ill. 69, 79, 29 N. E. 888, 891, in which case, however, the court found a monopoly purpose which would seem to class the case with those cited *infra*, note 12.